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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 329

EDWARD A. BLAIR,

Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

JOHN W. GASKINS,
FRED W. SHIELDS,
GEORGE R. SHIELDS,
HERMAN J. GALLOWAY,
Counsel for Petitioner.

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No. 329

EDWARD A. BLAIR,

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vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

Your petitioner, Edward A. Blair, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above-entitled case.

Opinion Below.

The opinion of the Court of Claims is not as yet officially reported.

Jurisdiction.

The judgment of the Court of Claims was entered May 5, 1941. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

Question Presented.

Whether a private Act of Congress providing for the retirement of an officer of the United States Marine Corps,

"with the retired pay and emoluments" of the grade in which he was serving authorizes the payment to him of rental and subsistence allowances?

Statute Involved.

The private Act of Congress of January 30, 1929, (c. 123, 45 Stat. 2043) reads as follows:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the President is authorized to appoint Edward A. Blair a second lieutenant of the United States Marine Corps and to retire him and place him upon the retired list of the United States Marine Corps with the retired pay and emoluments of that grade.
>
> "Approved January 30, 1929."

Statement.

The findings of fact of the Court below may be summarized as follows:

The petitioner, Edward A. Blair, a retired second lieutenant of the United States Marine Corps, was on November 12, 1906, appointed a cadet in the United States Revenue Cutter Service, and served as such cadet until May 27, 1908, when his resignation was accepted (Fdg. 1).

On January 22, 1909, he accepted appointment as second lieutenant in the United States Marine Corps (Fdg. 1). He served as an officer of the United States Marine Corps until September 11, 1913, when he was ordered to appear before a Marine Retiring Board, which Board found him incapacitated for active service, and that his incapacity was not the result of an incident of the service (Fdg. 2). On October 22, 1913, the President approved the proceedings and findings of the Board and directed that petitioner be wholly retired from the service in conformity with Sections 1622 and 1252 of the Revised Statutes (Fdg. 2). Petitioner was wholly retired from the service on October 22, 1913 (Fdg. 2).

On January 30, 1929, a private Act of Congress was approved, authorizing the President to appoint petitioner a second lieutenant of the United States Marine Corps and to retire him and place him on the retired list of the United States Marine Corps with the retired pay and emoluments of that grade (Fdg. 3).

Pursuant to the said Act of Congress, petitioner was, on February 14, 1929, appointed a second lieutenant of the United States Marine Corps, with rank from January 30, 1929, which appointment he accepted on February 18, 1929 (Fdg. 3). On the same date he was placed on the retired list of officers of the Marine Corps with the rank of second lieutenant, where he has since remained (Fdg. 3).

Since being placed on the retired list, petitioner has received the retired pay of an officer of his rank and length of service, but has received no rental or subsistence allowances (Fdg. 4).

Petitioner filed suit in the Court of Claims on August 31, 1937, seeking to recover the rental and subsistence allowances of an officer of his grade and length of service (Fdg. 5).

The Court of Claims on March 3, 1941, filed findings of fact, and conclusion of law, holding that petitioner was entitled to recover, but suspended entry of judgment to await a showing of the exact amount due petitioner. Subsequently, on April 7, 1941, the Court entered an order withdrawing its findings, judgment and opinion of March 3, 1941, and held the case under submission to the Court. On May 5, 1941, the Court announced special findings of fact, conclusion of law, and opinion, holding that petitioner was not entitled to recover and ordering that his petition be dismissed.

If entitled to recover rental and subsistence allowances there is due the petitioner $4,625.52, representing the amount

of such allowances for the period from August 31, 1931, to July 31, 1938, the date of the latest available roll on file in the General Accounting Office (Fdgs. 4, 5). His claim, however, is a continuing one.

Specifications of Errors to be Urged.

The Court of Claims erred:

(1) In holding that the private Act of Congress of January 30, 1929, did not authorize and require the payment of rental and subsistence allowances to a Marine Corps officer retired under the provisions thereof.

(2) In holding that the word "emoluments" as used in the private Act did not comprehend rental and subsistence allowances.

(3) In entering judgment against the petitioner and in favor of the United States.

Reasons for Granting the Writ.

1. *Conflict With McLean Decision, 226 U. S. 374, and Earlier Decisions of the Court of Claims.*

The court below, on March 3, 1941, announced a *per curiam* decision in this case, holding that petitioner was entitled to recover the rental and subsistence allowances of an officer of his grade but suspended entry of judgment pending the filing of a computation by the General Accounting Office showing the amount due. The decision is printed as Appendix A to the Petition.

On April 7, 1941, the court below, on its own motion, withdrew its decision in the case, and on May 5, 1941, announced the decision which plaintiff now prays this Court to review.

The original decision in the case followed the decision of this Court in *McLean* v. *United States,* 226 U. S. 374. In that case this Court held that, under a special Act of Con-

gress directing the Accounting Officers to settle and adjust all back pay and emoluments that would have been due and payable to an officer had he actually remained in the Army for a period during which he was out of the Army after his enforced resignation until his reinstatement, the words "all back pay and emoluments" included all allowances of every kind to which he would have been entitled under the pay statutes had he remained continuously in the Army.

The court said (page 381):

> "The words are all-comprehensive. They embrace all the compensation, perquisites and dues to which he was entitled as an officer."

and again the court said (page 383):

> "* * * and the word 'emoluments' is the most adequate that could have been used. It especially expresses the perquisites of an office, and its use in conjunction with 'pay' makes the restitution of the statute complete."

The Court of Claims has also held that the meaning of the words "allowances" and "emoluments" as used in the pay statutes is synonymous. In *Sherburne* v. *United States*, 16 C. Cls. 491, 496, it said:

> "Pay is a fixed and direct amount given by law to persons in the military service, in consideration of, and as compensation for their personal service. Allowances, as they are now called, or emoluments, as they were formerly termed, are indirect or contingent remuneration which may or may not be earned, and which is sometimes in the nature of compensation, and sometimes in the nature of reimbursement."

The foregoing language was quoted with approval in *Wilson* v. *United States*, 44 C. Cls. 428, 435.

It may also be pointed out that counsel for respondent in the court below, in effect, conceded that "emoluments"

were "allowances", the case being submitted by them without argument for determination on the facts, (about which there was no dispute), the Special Act involved and the decisions of the court below in *Sweeney* v. *United States*, 82 C. Cls. 640, and *Ralston* v. *United States*, 91 C. Cls. 91, certiorari denied, 311 U. S. 687.

In the *Sweeney* and *Ralston* cases, the court below had held that officers retired under Special Acts of Congress providing for the payment to them of the retired pay and allowances of their respective grades were entitled to receive rental and subsistence allowances.

Despite the well settled meaning of the word "emoluments" the court below, with two judges disagreeing on this point, refused to give it its usual meaning.

One of the grounds stated in Rule 38, Paragraph 5, Section b, for the granting of a Writ of Certiorari, is:

> "Where a Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court on the same matter," etc.

Here the case is even stronger. The court below first announced a decision favorable to the petitioner, which it subsequently withdrew on its own motion and then two months later announced a decision in favor of the respondent, which last decision is in complete conflict with the decision of this Court in *McLean* v. *United States, supra,* as well as the earlier decisions of the court below in *Sherburne* v. *United States, supra,* and *Wilson* v. *United States, supra.*

2. *Importance of Issue Involved.*

While this immediate case involves the construction of a private Act, the question presented, involving as it does the meaning of language frequently used by Congress in legislating for the armed services, is nonetheless of substantial general importance. The term "emoluments" has a long-established and clearly understood meaning in the military

and naval services. The Congress has repeatedly used that term in both the general pay statutes and in special Acts. Its meaning was conclusively established by a decision of this Court in the *McLean* case, *supra*. The construction which the majority of the court below has given the special Act here involved renders the word "emoluments" meaningless and superfluous for all practical purposes. It is of course an elementary rule of statutory construction that effect must be given to every word and clause, if possible, avoiding any construction which implies that Congress was ignorant of the meaning of the language it employed or that it used meaningless or superfluous words. *Montclair* v. *Ramsdell*, 107 U. S. 147; *United States* v. *Fisher*, 109 U. S. 143. The decision of the Court below casts doubt upon the established meaning of the term "emoluments" and it is important that Congress be in the position to employ language having an established and well-settled meaning in legislating for the armed services.

There is at the present time one case pending in the court below involving the identical question here presented and another case involving substantially the same question.[1]

Merits of the Case.

The merits of the case sufficiently appear from what has been previously said. The court below has failed to follow the decision of this Court, as well as its own earlier decisions. The case affects the substantial rights of several officers on the retired list.

In exercising its discretionary appellate jurisdiction, this Court may consider the circumstance that the court below has exclusive jurisdiction of these controversies. *Cf. Paramount Publix Corporation* v. *American Tri-Ergon Corporation*, 293 U. S. 328, 294 U. S. 464.

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[1] *Horton* v. *United States*, C. Cls. No. 43,670. *Willey* v. *United States*, C. Cls. No. 43,644.

Conclusion.

It is respectfully submitted for the reasons stated this petition for a writ of certiorari should be granted.

JOHN W. GASKINS,
FRED W. SHIELDS,
GEORGE R. SHIELDS,
HERMAN J. GALLOWAY,
Attorneys for Petitioner.

APPENDIX "A".

IN THE COURT OF CLAIMS OF THE UNITED STATES.

No. 43641.

(Decided March 3, 1941.)

EDWARD A. BLAIR

v.

THE UNITED STATES.

OPINION.

Per CURIAM:

This is a suit of a reserve officer in the United States Marine Corps to recover rental and subsistence allowances as provided by the Act of January 30, 1929, 45 Stat. 2043.

The findings show that on January 22, 1909, the plaintiff was appointed a second lieutenant in the United States Marine Corps and that on September 11, 1913, a Marine Retiring Board found him incapacitated for active service. On October 22, 1913, the President approved the proceedings and findings of the Board and directed that plaintiff be retired from the service in accordance with the law.

By a special Act of Congress of January 30, 1929, the President was authorized to appoint the plaintiff a second lieutenant in the United States Marine Corps and to retire him and place him upon the retired list of the Marine Corps "with the retired pay and emoluments of that grade."

As we understand the situation, the Comptroller General refused to pay any allowance to plaintiff for the period of his retirement on the theory that the word "emoluments" in the statute did not include allowances to retired officers. The Supreme Court and this Court, however, have decided otherwise. In the case of *McLean* v. *United States,* 226 U. S. 374, 381, the Supreme Court said that the words "all back pay and emoluments" were "all-comprehensive. They embrace all the compensation, perquisites and dues to which

he was entitled as an officer." And again (on page 383) "the word 'emoluments' is the most adequate that could have been used. It especially expresses the perquisites of an office." This Court has followed the rule stated above in *Sherburne* v. *United States*, 16 C. Cls. 491, and *Wilson* v. *United States*, 44 C. Cls. 428, 435.

Plaintiff's petition was filed on August 31, 1937. That portion of his claim which accrued prior to August 31, 1931, is barred by the statute of limitations. Plaintiff has not been paid any rental and subsistence allowances for the period involved and is entitled to recover therefor from August 31, 1931. His claim is a continuing one and judgment will therefore be suspended awaiting a report from the General Accounting Office as to the amount due him in accordance with this opinion.

A true copy.
Test:

—— ——, Chief Clerk, Court of Claims of the United States.



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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 329

EDWARD A. BLAIR, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinions of the Court of Claims (R. 5–6) are not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered May 5, 1941 (R. 7). The petition for a writ of certiorari was filed August 1, 1941. The jurisdiction of this Court is invoked under the provisions of section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

Whether a private act of Congress providing for the retirement of an officer of the Marine Corps

"with the retired pay and emoluments" of the grade in which he was serving authorizes or requires the payment of full rental and subsistence allowances.

STATUTE INVOLVED

The Private Act of Congress of January 30, 1929, c. 123, 45 Stat. 2043, reads as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the President is authorized to appoint Edward A. Blair, second lieutenant of the United States Marine Corps and to retire him and place him upon the retired list of the United States Marine Corps with the retired pay and emoluments of that grade.

STATEMENT

The findings of fact of the Court of Claims (R. 3–5) may be summarized as follows:

Petitioner, Edward A. Blair, accepted an appointment as a second lieutenant in the United States Marine Corps on January 22, 1909 (R. 3). On September 11, 1913, he was ordered to appear before a Marine Retiring Board which found him to be incapacitated for active service because of a disease of the spine, and that such incapacity was not the result of an incident of the service (R. 3–4). On October 22, 1913, the President approved the proceedings and findings of the Board and directed that petitioner be wholly retired from the service (R. 4). Petitioner was wholly retired from the

service on October 22, 1913 (R. 4). On January 30, 1929, an Act of Congress was approved which authorized the President to appoint petitioner a second lieutenant of the United States Marine Corps, and to retire him, and to place him upon the retired list of the Marine Corps with the retired pay and emoluments of that grade (R. 4). Pursuant to the authority vested in him by the statute, the President, on February 14, 1929, appointed petitioner a second lieutenant in the United States Marine Corps (R. 4). Petitioner accepted such appointment on February 18, 1929, and on the same day petitioner was placed on the retired list of officers of the United States Marine Corps (R. 4). After retirement, petitioner received the retired pay of an officer of his rank and length of service, but received no rental or subsistence allowances (R. 4).

On August 31, 1937, petitioner brought suit to receive the active-duty allowances of subsistence and rental (R. 1–2). On March 3, 1941, the Court of Claims filed findings of fact and conclusions of law to the effect that the petitioner was entitled to recover (R. 3). On April 7, 1941, on the court's own motion, the special findings of fact, conclusions of law, and opinion entering judgment for the petitioner were vacated and withdrawn (R. 3). On May 5, 1941, the court decided as a conclusion of law that petitioner was not entitled to recover, and entered judgment dismissing the petition (R. 7).

ARGUMENT

The court below decided that the provision of the private act that petitioner be placed upon the retired list with retired pay and emoluments of the grade of second lieutenant did not entitle petitioner to receive the active-duty allowances of subsistence and quarters. We submit that the decision below is correct.

1. Whether or not the word "emoluments" comprehends rental and subsistence allowances depends upon the context in which the word appears. The act which authorized the retirement of petitioner utilizes the clause "retired pay and emoluments." Under ordinary rules of construction, the word "retired" modifies "emoluments" as well as "pay"; and there are no retired subsistence and rental allowances. Admittedly, under the general retirement statutes, rent and subsistence allowances are excluded from the pay due retired officers. The uniform administrative practice has been to consider that the inclusion of the word "allowances" or "emoluments" in a special act providing for retirement does not entitle the beneficiary to any greater amount than is allowed officers retired under the general retirement statutes. Congress must be assumed to have legislated with this administrative interpretation in mind. *McFeely* v. *Commissioner,* 296 U. S. 102, 108. Moreover, the basic policy embodied in the Act of June 10, 1922, 42 Stat. 625, which provides that the pay and allowances of all similarly situated officers in

the uniformed services of the United States should be on a plane of equality, would be violated were officers retired under similarly phrased private acts given a preferred position to those retired under general retirement acts. Nothing in the legislative history of the special act here involved suggests an intent on the part of Congress to grant petitioner such preferred status, but, indeed, that history clearly indicates that payments to petitioner were to be limited to the usual retirement pay.[1]

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[1] Sen. Rpt. No. 882, 70th Cong., 1st sess., which accompanied the bill, included a letter from the Secretary of the Navy stating that should the bill be passed the cost to the Government would be $1,181.25 annually and the report itself indicates that this was to be the amount received by petitioner upon passage of the bill. The monthly pay, without allowances, of a retired second lieutenant in the Army with over three and less than six years' service is $98.44 (one-twelfth of $1,181.25). Army Pay Tables, War Department, January 30, 1931, page 8. Officers of the Marine Corps are entitled to receive the same pay and allowances as are or may be provided for the officers of like grades in the Infantry of the Army (R. S. § 1612, 34 U. S. C. 971), and the officers in the Marine Corps shall be, in relation to rank, on the same footing as officers of similar grade in the Army (R. S. § 1603, 34 U. S. C. 651). In addition, section 17 of the Pay Act of 1922 provides that on and after July 1, 1922, retired officers shall have their retired pay computed as authorized by law on the basis of pay provided in that Act (i. e., as computed in the Army Pay Tables, *supra*). 42 Stat. 632, 37 U. S. C. 26.

The report also recites that Blair had been retired in 1913 because of a spinal disease which was believed at that time to have been hereditary and that the finding of the retirement board that his physical disability had not been incurred in the line of duty precluded him from being placed upon the retired list and receiving the retired pay to which he would have been entitled had the injury been sustained in the line

2. No conflict exists between the decision below and that of this Court in *McLean* v. *United States,* 226 U. S. 374. The act involved in the *McLean* case was in the nature of a back pay rather than a retirement act. It provided that McLean's widow receive "all back pay and emoluments" which would have been due McLean as a Major between certain dates. Clearly the act there in question comprehended all emoluments and the Court held that such emoluments included certain allowances. The court below in the instant case did not reject that result but simply held that the words "retired emoluments" could be given effect by considering certain perquisites of a retired officer other than allowances for subsistence and quarters. The majority of the court below undertook to distinguish its prior decisions in *Sweeney* v. *United States,* 82 C. Cls. 640, and *Ralston* v. *United States,* 91 C. Cls. 91, certiorari denied, 311 U. S. 687, on the ground that certain perquisites of a retired officer could be considered retired emoluments but not retired allowances.[2]

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of duty. There was included in the Senate Report a statement by a medical expert, who had examined the clinical notes on the case, that the spinal injury which had caused the retirement of Blair was not and could not have been hereditary. The report stated that the purpose of the special act was to place Blair in the same position as he would have been had the retiring board in 1913 concluded that the injury had been received in the line of duty.

[2] Judges Littleton and Madden concurred in the opinion except in so far as it undertook to distinguish the *Sweeney* and *Ralston* cases. In that respect they adopted the dis-

In the light of the foregoing, we respectfully submit that not only was the decision of the court below correct but that it also would have been justified in proceeding further and overruling its prior decisions in the *Sweeney* and *Ralston* cases.[3]

CONCLUSION

The decision below presents a question of substantially less importance than that in the *Ralston* case in which this Court denied certiorari. The result reached by the court below is correct and as petitioner points out (Pet., p. 7) no conflict either exists or can arise. We respectfully submit, there-

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senting opinion of Judge Madden in *Long* v. *United States*, —, C. Cls. —, No. 43642, decided May 5, 1941.

[3] In the *Ralston* case the United States filed a petition with this Court asking for writ of certiorari. It pointed out in the petition the reasons which led it to believe that the decision below was erroneous and that the question involved was of sufficient importance to call for a review by this Court. The petition was denied, 311 U. S. 687. In suggesting the desirability of review on the ground of the importance of the question involved, the Government took the position that acts using the expression "retired pay and allowances" and "retired pay and emoluments" were on an equal basis and were equally involved. If this Court concluded that such showing failed to demonstrate the importance of the question, it is suggested that the instant case, which deals only with those acts involving the expression "retired pay and emoluments," is clearly more circumscribed. Petitioner suggests that two other cases are now pending in the Court of Claims involving the same or a similar question (Pet., p. 7), but both of those cases have been decided in accordance with the instant case. *Horton* v. *United States*, — C. Cls. —, No. 43670, decided May 5, 1941, *Willey* v. *United States*, — C. Cls. —, No. 43644, decided May 5, 1941.

fore, that the petition for writ of certiorari should be denied.

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PAUL A. SWEENEY,
Attorney.

SEPTEMBER 1941.

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